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FILED ELECTRONICALLY

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Ex Parte* Presentation in CS Docket No. 97-80 and PP Docket No. 00-67

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, Starz Encore Group LLC ("Starz Encore") submits this notice of an *ex parte* presentation in the above-captioned proceeding.

On May 16, 2003, Thomas P. Southwick (Vice President, Corporate Communications, Starz Encore), Richard Turner (Vice President, Business Affairs-Programming, Starz Encore), Richard H. Waysdorf (Vice President, Business Affairs-Affiliate Relations, Starz Encore), and myself met with William H. Johnson (Deputy Bureau Chief), Rick C. Chesson (Associate Bureau Chief and Chair, DTV Task Force), Thomas L. Horan (Senior Legal Advisor), Susan A. Mort (Policy Division), Michael S. Perko (Chief, Office of Communications & Industry Information), and Alison Greenwald (Engineering Division) (all of the Media Bureau) to discuss the Memorandum of Understanding between representatives of the cable television industry and the consumer electronics industry (the "MOU") and the proposed digital plug and play encoding rules submitted to the Commission in the above-captioned proceeding.

Starz Encore provides premium programming packages for distribution by cable operators and other multichannel video programming distributors ("MVPDs"). Among its offerings is a service known as Subscription Video-on-Demand ("SVOD"). SVOD subscribers pay a flat monthly fee to be able to select premium movies from a large, rotating menu, and can watch those movies when they choose, as often as they want. During the meeting, Starz Encore explained its concern with the proposed encoding rules before the Commission, which would categorize SVOD as a "copy never" service. As Starz Encore explained, this would be inconsistent with consumer expectations and with the historical underpinning of the copying rules as embodied in the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 1201(k). Starz Encore was not at the table when the MOU or its predecessor, the so-called 5C Agreement, were negotiated. Starz Encore contends that the Commission should not endorse a private agreement between only two of the affected industries, where the recommended encoding rules applicable to SVOD are inconsistent with the DMCA.

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Enclosures
cc: FCC Attendees

SUBSCRIPTION VIDEO-ON-DEMAND

Proposed Digital Television Encoding Rules Will Hurt Consumers and Should Be Changed.

If approved by the FCC, a deal between the cable industry and the TV set manufacturers will eliminate the rights of consumers to record for home use Subscription Video-On-Demand programming. This would contravene earlier rules and court decisions that established the rights of consumers to record their favorite shows. Congress should protect consumers' rights by ensuring that the FCC allows consumers to copy Subscription Video-On-Demand programming ("Subscription-VOD") for personal use.

Subscription-VOD is the Next Generation of Premium Movie Service.

Subscription-VOD is a new category of programming, offered over cable television, direct broadcast satellite, and broadband (IP) distribution systems. Subscribers pay a flat monthly fee to be able to select premium movies from a large, rotating menu, and can watch those movies when they choose. Because Subscription-VOD is subscription-based, unlike Pay-Per-View ("PPV") or Video-On-Demand ("VOD"), subscribers can watch as many movies as they want, as often as they want.

A Recent Agreement Between CEA and NCTA Threatens Subscription-VOD.

A Memorandum of Understanding ("MOU") filed with the FCC last December threatens Subscription-VOD by proposing that the FCC implement unreasonable "encoding rules" for the Subscription-VOD format. Encoding rules govern the way digital television programming carried on cable systems must be encoded for reception by digital televisions. As an anti-piracy measure, these encoding rules define the rights of consumers to make copies of broadcast and cable programming. The rules proposed in the MOU would prevent consumers from making even a single copy of Subscription-VOD movies for later viewing – despite their legitimate expectations to be able to do so (just like with other premium subscription cable programs). The problem is that if consumers cannot make copies for legitimate personal use, they will not want to subscribe – and the programming and the technology will not be developed.

The MOU Encoding Rules Place Subscription-VOD in the Wrong Category.

The encoding rules in the MOU divide programming into three types, with different copy-protection rules for each:

- No copy protection for over-the-air television programs;
- "Copy Once" protection for cable television (including premium channels); and
- "Copy Never" protection for PPV programs, VOD, and Subscription-VOD.

Because it is a subscription-based service and not a pay-per-view service, Subscription-VOD belongs in the "Copy Once" category, not the "Copy Never" category. If Subscription-VOD is classified as "Copy Once," on the other hand, subscribers will be able to record their programming choice while it is still available, and then watch it when they choose.

The MOU was Negotiated Without Starz Encore at the table and Before Subscription-VOD was developed.

The industry agreement on which the MOU was based was reached before Subscription-VOD had been developed. The Consumer Electronics Association (“CEA”) and the National Cable & Telecommunications Association (“NCTA”) negotiated the MOU. Starz Encore, which is the leader in Subscription-VOD development, was not a party to the MOU negotiations and had no input on the MOU or the treatment of Subscription-VOD.

Subscription-VOD Should Be Treated the Same As Subscription Based Premium Cable Programming – Copy Once.

Unlike PPV and VOD, Subscription-VOD is very much like a premium cable channel because of its subscription-based, rather than transaction-based, business model. And it is the *business model* that Congress intended to be the defining characteristic for whether programming was to be classified as “Copy Once” or “Copy Never.” Currently, however, the MOU classifies Subscription-VOD as “Copy Never” – as if it were a pay-per-view service.

Because the selection of premium movies shown on Subscription-VOD rotates, busy subscribers may frequently find that their preferred selection is no longer available when they finally have time to watch it. Even more baffling, subscribers may encounter Copy Once for a movie title selected from a Starz Encore linear service, and simultaneously encounter Copy Never for the same exact movie title selected from Starz Encore’s Subscription-VOD service.

Classifying Subscription-VOD as “Copy Once” is Consistent with the DMCA, Fair Use, and Legal Precedent, and Protects Copyright Owners.

Classifying Subscription-VOD as “Copy Once” is consistent with the Digital Millennium Copyright Act (“DMCA”), and would reflect reasonable and legitimate consumer expectations about what they can do with a particular kind of programming. The MOU, on the other hand, distorts the clear intent of Congress in the DMCA with respect to Subscription-VOD.

Classifying Subscription-VOD as “Copy Once” is consistent with the landmark 1984 *Betamax* U.S. Supreme Court decision, which held that consumers have a “fair use” right to make copies of TV programming for personal, time-shifting purposes. The CEA and NCTA are attempting to limit consumers’ fair use rights as those rights have been commonly understood since the 1984 *Betamax* decision. If the MOU encoding rules are left as proposed, Starz Encore will be unable to maintain consumers’ rights, because the motion picture studio copyright holders will strive to obtain the most limited rights possible, and will prevent Starz Encore from licensing movies with more than the minimum permitted copying.

Classifying Subscription-VOD as “Copy Once” adequately protects copyright owners, preserves the legitimate fair use rights and expectations of consumers, fulfills the clear intent of Congress in the DMCA and puts Subscription-VOD on an equal footing with other premium subscription-based cable services.

Congress Should Ensure That Subscription-VOD Content Can Be Copied Once.

Evolution of Premium Television Technical Distribution Platforms and Their Corresponding Business Models

Business Model Technical Distribution Platform	Transactional*		Subscription**	
	Offering	Copy Protection	Offering	Copy Protection
Analog Channel	PPV Single program. <i>(e.g., Request TV)</i>	Copy Never	Single Premium TV Channel <i>(e.g., HBO)</i>	Copy Once
Digital Multichannel	NVOD Single program over multiple digital channels, staggered start times. <i>(e.g., In Demand NVOD)</i>	Copy Never	Multiple Premium TV Channels Multiplexed digital premium channels. <i>(e.g., Encore Multiplex)</i>	Copy Once
Video On Demand	Transactional-VOD Single program with viewer control. <i>(e.g., In Demand VOD)</i>	Copy Never	Subscription-VOD View any program from a premium program listing with viewer control. <i>(e.g., Starz On Demand)</i>	Copy Once***

***Transactional Fee Structure:** Separate fee for each individual program transmission purchased.

****Subscription Fee Structure:** Monthly subscription fee for all program transmissions of the offering.

*****The Copy Once for Subscription-VOD should be the appropriate copy rule in accordance with DMCA. 5C and MSO/CE Plug 'N Play recommends Copy Never.**

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